The Waitangi Tribunal and the Regulation of Māori Protest

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Abstract
Much of the current academic and political discourse related the development and operations of the Waitangi Tribunal over its first twenty years portray it as a forum that provided Māori with a meaningful avenue for settling Treaty grievances compared to the formal legal systems performance in the preceding 100 years. In contrast, we argue that from its inception and throughout much of the 1980s, the Waitangi Tribunal functioned primarily as an informal justice forum that assisted the New Zealand state's regulation of Māori Treaty activism during the transition from a Fordist to a Post-Fordist mode of capital accumulation.

Introduction

Despite the political rhetoric of successive governments around partnership and a commitment to the Treaty of Waitangi, Māori Treaty rights remain contested, as represented in the contemporary moment in legislation such as the Foreshore and Seabed Act 2004. In this context, it is useful to reflect on an important period of Crown and Māori relations, a period that marked a shift in recognising longstanding Treaty rights through the development of a specific forum for reviewing Māori Treaty grievances - the Waitangi Tribunal. The paper examines the important formation period of the Tribunal in the early 1970s to mid 1990s to illustrate two interrelated points: firstly the Tribunal's formation poses a contradiction in that while it represented the first meaningful examination of Crown breaches of Maori Treaty rights, it did so utilising an 'informal' review process that initially lacked the authority to impose binding decisions; and secondly that during this period the Tribunal encouraged the incorporation of Māori political and social activism into a government controlled forum.

The establishment of the Waitangi Tribunal under the Treaty of Waitangi Act 1975 appeared to offer Māori a meaningful process for airing their Treaty grievances. Until the Tribunal's formation, Māori Treaty activism had been largely contained within the formal court processes of the justice system and governmental processes which decade upon decade denied recognition of Māori rights.

The paper focuses on two related questions: 'why did the government develop the Waitangi Tribunal at this juncture in State/Māori relations', and 'what function or purpose did the Tribunal serve at this point in State/Māori relations'? We argue that the processes and mechanisms of the Tribunal constituted a form of regulation resulting from the shift from a Fordist to a Post-Fordist mode of capitalist accumulation in New Zealand from the late 1970s. More precisely, the formation of the Waitangi Tribunal and the first decade of its operation can be understood as a state-centred informal justice forum that assisted the state in regulating the potential hegemonic impact of Māori Treaty activism.

The authors' set out to contest claims that the Tribunal and its processes are evidence that the New Zealand state had sought to address Treaty grievances in a meaningful way, by providing Māori with a forum where they could 'tell their stories of dispossession' (Maaka & Fleras 2005; see later discussion on perspectives on the development and role of the Tribunal). In contrast, we argue that although the regulation of Māori protest and Treaty grievances from the inception of the Tribunal may not have been as overt as those employed during the colonial context[1], regulation existed nonetheless; albeit reconstituted to reflect the developing Post-Fordist economic and regulatory environment. We use regulation theory as a theoretical and conceptual framework to describe the underlying socio-political drivers behind the development of the Tribunal at a particular point in State/Māori relations.

The decision to focus on the early period of the operations of the Tribunal (from 1975 to the late 1980s) was influenced firstly, by the fact that the establishment of the Tribunal signalled the first instance in which the state had organised a specific, institutionalised response to Māori activism after a long period of disengagement from Māori and their Treaty issues. Prior to that the Tribunal the Government had considered the Treaty a 'nullity', and left it to the courts to mediate (and consistently) repudiate Māori claims. And secondly, much of the material generated by academics and researchers on the Tribunal has focused on claims-making and the way in which the Tribunal dealt with claims and government responses to their

[1] The colonial government legislated extensively in the nineteenth century to suppress Māori protests against land sales. For example the *Suppression of Rebellion Act 1863* allowed for the arrest of Māori who were defined as rebels, generally defined as those who refused to sell, resulting in the confiscation of their land (Ward, 1995).

deliberations. In comparison, our focus is on the drivers behind the development of the Tribunal at a particular point in State-Māori relations, which we believe is an under-theorised and researched area of the Tribunals history and operations.

The State's response to Māori political dissent

As the historical record shows, Māori have long contested the ways in which the Crown and the New Zealand government have developed policies that directly impact on them and their communities, particularly in relation to land confiscation and breaches of the Treaty of Waitangi. As stated earlier, most of this activity had been dealt with through the state-dominated justice system, as well as numerous petitions made by hapū and iwi to government and the Crown. However, by the late 1960s, the form and nature of Māori Treaty-related activity began to change (Morris, 2003; Ward, 1993). Spurred by the ethnic reorganisation of other colonised indigenes and influenced by the Black civil rights movement of the 1960s, Māori began to more actively express their discontent with assimilationist state policies since the 1880s (Hill and Bonisch-Brednich, 2007, pp. 166-167; Poata-Smith, 1996; 2004). Thus, in 1970 the protest organisation, Ngā Tamatoa (Young Warriors) began its career of confrontational politics against the New Zealand state (Hazlehurst, 1993). In 1975 the then Labour Government was confronted by the famous Hikoi (Great March) of numerous Māori from the far north to the steps of Parliament in Wellington (Walker, 1987). And by the mid 1980s organised Māori activist movements had emerged as a potent political force in challenging government's hegemony over State/Māori policy (Spoonley, 1989).

The impact of the rise of Māori protest activism on government policy, cannot be overstated (see Poata-Smith, 1996; 2004). For example, Catalanic (2004) argues that one of the key drivers behind the rise of Māori activism was the policy context that predominated in New Zealand for much of the twentieth century, one based on assimilating Māori into 'mainstream society'. To further this policy, government actively denied Māori grievances by ignoring Treaty issues, while at the same time upholding the Treaty of Waitangi as the founding document of the nation via the 'joining together as one, the Crown and Māori'. This continued, policy-driven denial of Treaty justice was instrumental in the radicalisation of Māori Treaty

politics. In relation to the link between Māori activism and the development of the Tribunal, Catalanic (ibid, p. 11) states that:

> The policy assimilation that characterised New Zealand politics and society acted as a constraint to the definition of Māori socio-economic problems as connected to Crown injustices committed under the Treaty.... [therefore]... the New Zealand politico-institutional context... conditioned the way in which Māori sought to draw attention to their problems – protest activism – that was eventually the most successful factor in achieving the desired recognition.

The New Zealand state's response to the hegemonic threat posed by the radicalisation of Māori ethnic politics was swift. From the mid-1970s the state's policy and administrative response moved from being openly assimilationist, to become imbued with the rhetoric of Māori bicultural ideology (Tauri, 1998). Administrative responses included attempts to increase public service responsiveness to Māori values, needs and aspirations; a new distributive ideal based on the bicultural allocation of power and resources; and acceptance of the Treaty of Waitangi as a policy blue print for reuniting 'the founding partners of New Zealand' (Sissons, 1990). However, arguably the most substantive response to the counter-hegemonic activity of Māori was the Waitangi Tribunal.

The Waitangi Tribunal

The Waitangi Tribunal was established by the third Labour Government (1972-1975) with the passing of the Treaty of Waitangi Act in 1975. At this point the Tribunal was given the authority to inquire into and make recommendations to the Crown (represented by the Government of the day) relating to Māori claims against government actions that they believed contravened their rights under the Treaty of Waitangi (Catalinac, 2004; Gibbs, 2006). The government's intentions for the Tribunal in terms of process and jurisdiction are summarised by Ward (1993, p. 185) who writes that:

> [I]n future, 'any Māori' or group of Māori who considered that they were prejudicially affected by any act of the Crown or its agents, in breach of the principles of the Treaty of Waitangi, could bring a claim to a new tribunal, the Waitangi Tribunal. The Tribunal would *act as a commission of enquiry*, with *power to summon witnesses*, *investigate widely* and *make recommendations* (emphasis ours).

However, despite the authority given to the Tribunal to investigate, initially the jurisdiction of the new body were significantly constrained. In order to gain Government support for the Tribunal in the first instance, one of its chief architects, the late Matiu Rata (Rata, 1989) made a number of significant concessions at Cabinet level relating to the powers of the proposed forum. For example, the legislation that established the forum determined that after a hearing was held with Māori complainants, the Tribunal was empowered to only make recommendations to Government on how it should respond. However, the Government was not bound by the Tribunal's recommendations and could ignore them at will (Sorrenson, 1995; Stokes, 1993). The legislation also restricted the forum to considering claims emanating from violations of the Treaty of Waitangi occurring *after* 1975 and purposely excluded historical claims. These concessions meant that the vast majority of events considered by Māori to represent significant breaches of the Treaty contract, sat outside the jurisdiction developed for the new entity.

The restrictions in jurisdiction caused concern amongst some Māori commentators. Ward (1993) relates that as a result few claims were brought before the Tribunal. However, this situation changed with the advent of a 'bi-cultural tribunal process' instigated by Chief Justice Eddie Durie in the early 1980s, and the content of initial reports that underlined the extensive scope and nature of Māori grievances, and Crown breaches of Māori Treaty rights (see the Waitangi Tribunal 1983; 1984). This, along with what Ward (1993, p.186) describes as New Zealand middle class desire to 'confront the historic sources of Māori grievance and to offer redress', saw these jurisdictional restrictions partially lifted with passing of the Treaty of Waitangi Amendment Act 1985 by the then recently elected Labour Government. The legislation extended the Tribunal's jurisdiction to enable

it to consider Māori claims against violations that took place after the signing of the Treaty in 1840 (Gibbs, 2006).

Despite significant constraints on the initial jurisdiction placed upon the Tribunal, arguably little changed after the alterations provided for in the 1984 legislation, a range of authors (e.g., Robinson, 2002; Walker, 1989 and Ward, 1993) claim that the forum represented a significant change in the State's response to Māori Treaty grievances. In summing up this perspective, Catalanic (2004, p. 10) writes that '[i]t (the Tribunal) has been heralded as marking the beginning of a post-colonial era in New Zealand, in which Māori-Pākehā relations were being transformed from Pākehā dominance to negotiation towards greater justice, equity and partnership'. While undoubtedly the Tribunal signalled a change in formal Government process for dealing with Māori grievances, the predominant perspective on the drivers behind its formation have a tendency to overemphasise the notion that it represented a *significant transformation in power relations between the state and Māori* (see for example, Maaka and Fleras, 2009). In comparison, we argue that a critical analysis focused on the wider socio-political context developing in New Zealand at the time, demonstrates that while the Tribunal represented a unique response, the purpose and goals aligned with previous policy: namely continued state control over Māori policy in light of changes in Māori grievance politics (see Gibbs, 2006 and Byrnes, 2004 for similar perspectives).

Key questions of the paper

As outlined earlier, this paper focuses on two inter-related questions: 'why did the government develop the Waitangi Tribunal at this juncture in State/Māori relations', and 'what function or purpose did the Tribunal serve at this point in State/Māori relations'? We argue that the answers lie in part in the wider changes in capitalist development in New Zealand from a Fordist to a Post-Fordist regime of accumulation that began in the mid-to-late 1970s and continued throughout the 1980s. In particular, we contend that the formation of the Tribunal can be linked to the growing popularity of informal justice processes as one mechanism employed by the modern state to regulate social discontent and political protest in Post-Fordist contexts.

Fordist to Post-Fordist regimes of accumulation and regulation

Regulation theory is useful for anchoring our examination of the New Zealand state's response to the increasing radicalisation of Māori political dissent, as it provides a framework to analyse the changes in the forms of regulation of populations and dissent in capitalist economies (Tickell & Peck, 1995). Regulation theory attempts to explain, through an analysis of capitalist development, the paradox between capitalism's inherent tendency towards instability and crisis and the constant drive to stabilise around a set of institutions, norms and rules that support, or attempt to affect economic and social stability (Amin, 1994).

Filion (2001, pp. 86-87) identifies two concepts at the core of regulation theory. *Regime of accumulation* describes the organisation of society that aid economic activity and growth. Included in this domain of activity are the political institutions, culture and systems of production. *Mode of regulation* refers to the nature of mechanisms that bring society in line with the requirements of the sphere of production. Amin (1994, p.8) describes the mode of regulation as the 'institutions and conventions which regulate and reproduce a given accumulation regime through application across a wide range of areas, including the law, state policy, political practices, industrial codes, governance philosophies, rules of negotiation and bargaining, cultures of consumption and social expectations'. These components of society can pattern behaviour in ways that support the prevailing regime of accumulation. They provide the social mores, beliefs and behaviours that support capitalist accumulation (Painter and Goodwin, 1995).

Due to its contradictory and crisis-ridden tendencies, capital requires forms of institutional regulation to supports its continued reproduction and legitimacy. Successive phases of capitalist development can be characterised and analysed via the combination of regimes of accumulation and regulation formed to support capital in that particular epoch (Jessop, 1994). Each regime therefore has distinctive regulatory characteristics and regulation theory attempts to explain transformations and differences between phases, such as the movement from a Fordist regime to a Post-Fordist regime of

accumulation that occurred in many western capitalist societies from the immediate post-war period onwards[2].

Fordism

The Fordist regime of accumulation is generally characterised by mass production and mass consumption, based upon the assembly line production techniques introduced in the United States at the turn of the twentieth century by Henry Ford (Lipietz, 1992). As Wilkes (1993) notes, the concept of assembly line production brings with it notions of universalism, uniformity, repetition and rationality. The regulatory forms commonly ascribed to Fordism include the welfare state[3]; the role of trade unions in raising consumption standards of working class and public servants; the media-inspired interest in mass consumption and the replacement of the extended family with the nuclear model as the family formation of modern society (Falion, 2001). The Fordist accumulatory epoch is generally considered to have lasted from the early 20th century until the early 1980s depending on the particular jurisdiction, at which time the supporting regulatory regimes began to lose their effectiveness. Lipietz (1992) contends that crisis developed within Fordism's supposed universal and rational system as real wages continued to increase and the cost of fixed capital in relation to the total work force also rose, resulting in the retraction of profit margins. This brought forth a new accumulative and regulatory regime, Post-Fordism.

Post-Fordism

In contrast to the Fordist epoch, Post-Fordism is characterised by a reduced role in society for trade unions; a sharper division in the working class between core and peripheral workers; and a greater flexibility of work practices, characterised by diversification, rather than universalism. The Post-Fordist mode of production has been described as involving the

2 See Amin (1994) and Jessop (1995) for discussions about different theoretical explanations on the emergence of Post-Fordism.

3 Lipietz (1986a) writes that the Fordist mode of regulation in Western jurisdictions often included a welfare system designed to ensure every wage earner a guaranteed income in times of economic hardship, with social legislation covering minimum wage levels and collective agreements. This tends to institutionalise the class struggle by meeting some of the needs of workers, whilst allowing capitalist accumulation, including the cheap appropriation of labour, to continue.

commodification and privatisation of a range of collective services that were previously organised by the Fordist state (Aglietta, 1979). The market reforms of the 1980s to mid-1990s in New Zealand showed a decisive move towards this type of capital organisation and accumulation, the privatisation of public works a clear example of this process (Kelsey, 1993; 1997).

The move towards a Post-Fordist era of capital accumulation is accompanied by the development of different modes of regulation. As with modes of regulation characteristic of previous forms of capital accumulation, they provide the means of institutionalising and confining class struggle and potential hegemonic crises within state-controlled processes. These modes of regulation will be different from those which characterise the containment and control of class and ethnic relations in the Fordist era.

Despite the existence of the range of regulatory mechanisms listed above, crises of capital within the Fordist era brought about the need for new and innovative forms of regulation. The state's response to the social disintegration inherent in the crises of accumulation was to penetrate even more deeply into civil society in order to restructure social relations into forms appropriate to the emergence of a new, Post-Fordist regime of accumulation. This statement is perhaps at odds with the common portrayal of the Post-Fordist state as less regulatory and less involved in civil society (see Bonefield and Hollaway, 1991). Arguably, this portrayal is overstated. The rise of Post-Fordism did not see the state withdraw from its regulatory position, but instead re-shape itself and seek to control the regulatory process in different, less obvious ways than were constructed during the Fordist context. One less obvious form of state regulatory control is the informal justice forum, of which the Waitangi Tribunal, during its first decade or more of operation, greatly resembled.

Post-Fordist regulation and the rise of informal justice

Although the informal justice movement began initially during the latter part of the Fordist epoch, it was during Post-Fordism that its products became key components of the regulatory regime (Hofrichter, 1987). This was due in part to the growing obsolescence and ineffectiveness of Fordist state institutions and technologies of control that mediated class and social conflict during the earlier epoch (Santos, 1995). These institutions, including the police, courts and child care and protection, while still

powerful and coercive, were no longer on their own successful in reproducing what Spitzer (1982) calls *politically docile populations*.

Arguably, the rise of radical socio-political movements, such as feminism and indigenous activism, represented forms of political expression that contested the legitimacy of existing modes of justice, and therefore regulation, in the developing Post-Fordist context. These counter-hegemonic movements were not easily contained within existing institutional processes designed to support a Fordist accumulatory regime, thus prompting the development of alternative modes of regulation (Hofrichter, 1987). We contend that informal justice became a key Post-Fordist regulatory response in the New Zealand context, and that a primary example of this 'new form' of regulation was the Waitangi Tribunal.

Informal justice forums operate within Post-Fordism as pacificatory mechanisms, drawing potentially hegemonic activity into state-designed and dominated regimes. The Tribunal, particularly the way it operated throughout much of the 1980s, neutralised conflict that could threaten the state or capital accumulation by responding to legitimate Māori grievances in ways that inhibited their transformation into serious ideological or physical challenges to the authority of the state (Santos, 1982). Abel (1982) notes that informal justice institutions of this kind are generally created and controlled by the respondents, and rarely if ever by the grievant themselves.

In order to neutralise conflict, informal mechanisms must be able to attract disputants to their processes. State-centred informal justice seeks to achieve this goal by appearing to operate as a neutral arbiter between the claimants and the state. Inducing complainants to submit voluntarily to an informal justice regime heightens the chances of their accepting any decisions made and believing that 'justice has been done', despite the fact that the process is often designed to limit the possibility of adverse decisions being made against state interests. This has a neutralising effect on class conflict, by denying class antagonisms and appealing to general standards of engagement that are designed to promote capital affirming modes of social cohesion. As Selva and Bohm (1987, p. 50) note:

> [t]he residual is the legitimation of state intervention and the return to uncontrolled political power, delegalising social relations by loosening power from formal controls. Thus, under

> the banner of informalism and the rhetoric of personal justice, state authority and political control has been partially obscured.

From this brief conceptual outline, it become possible to explain the emergence of the Waitangi Tribunal during the rise of Post-Fordist phase of capital accumulation in the New Zealand context and to illustrate how regulation of Māori grievances and claims has changed in this transitional period. In the following section, the Waitangi Tribunal is examined as a form of Post-Fordist regulation, to demonstrate how the informal procedures it utilised throughout the 1980s, channelled, then neutralised, the hegemonic potentialities of Māori Treaty activism.

The Waitangi Tribunal as a Post-Fordist regulatory body

> It could be argued that the Waitangi Tribunal is a belated attempt to extend the hegemony of the rule of law over Māori, at a time when its legitimacy is most directly under attack (Jane Kelsey, 1984).

Chris Wilkes (1993) suggests the Fordist period in New Zealand was broadly located in the period 1935 to 1984, otherwise known as the 'Long Boom' (Nielson 1990, p. 81). During the 1960s the long boom was also sustained by increasing productivity of labour through mass production techniques and the rapid expansion of agricultural exports to the world economy, while the local economy and the manufacturing sector were protected through a range of state subsidies and tariffs (Roper, 1993). The Fordist phase was brought into crises in the late 1960s and early 1970s due to a falling rate of profit, rising foreign debt and the shifts in the global export markets away from New Zealand produce (ibid.).

In the move towards Post-Fordist accumulation and regulation in the 1980s, the Labour government introduced free market policies, collectively referred to as 'Rogernomics', which sought to restructure the New Zealand economy through privatisation of state services and assets[4]. Ideologically

[4] Rogernomics refers to the plethora of neo-liberal economic and social policies developed by Roger Douglas and the Labour government from 1984-1990. Douglas, the Minister of Finance from 1984-1988, argued that social goals and political considerations should be

driven by new right economic theory, the process involved the reformation of government control over key assets into separate *State Owned Enterprises* that were required to be profit focused. The enterprises could then be privatised and subsequently offered for sale to the private sector. Resistance to these policies came mainly from Māori, who saw the resources under the auspices of the enterprises being further alienated to private control, leading to potential breaches of their rights under the Treaty of Waitangi. Kelsey (1990, p.1) offers an insight into this effect on Māori articulation of Treaty grievances when she argues that:

> The pace and scope of Rogernomics left a politically naive and economically illiterate population stunned and apathetic. Significant resistance came from just one quarter. Māori movements of the 1970s intensified throughout the 1980s as Māori reasserted their rights under the Treaty of Waitangi to te tino rangatiratanga, or complete authority over themselves and the country's key resources of land, fisheries, waterways and minerals. With determination, and sometimes desperation they challenged the government moves to vest in the hands of private capital the resources guaranteed to te iwi Māori in the Treaty.

Māori concerns focused upon the fact that by privatising resources, the Government - as the Crown's representative - was potentially divesting itself of its Treaty responsibilities and, as result, their Treaty rights. The interests of capital would be supported through legislation, while Māori would remain economically and politically destitute, with little or no resources to exercise sovereignty over (Kelsey, 1990). Rising Māori protests challenged the legitimacy of the government's activities in this sphere, and through court action they were eventually able to curtail the Government's ability to implement the reforms (Kelsey, 1993). In order to allow capitalist accumulation to continue unimpeded, attempts were made to channel Māori activism into new forms of regulation, the most obvious being the Tribunal.

In the Fordist period, regulation of Māori protests against Treaty breaches was maintained firstly by a formal legal system that denied the validity of the Treaty, while emphasising parliamentary sovereignty as the

excluded from economic policy. Douglas and Labour sought to construct a highly deregulated economy in New Zealand, driven by market forces (Kelsey, 1997).

sole legitimate power in the country. Secondly, a paternalistic welfare state provided rising living standards for both European and Māori. While Māori did not have recognised Treaty rights, they had access to education, health and housing support. However, by the mid 1970s, both the legal and welfare systems were proving insufficient for regulating Māori Treaty grievances and political activism. This situation necessitated the development of alternative forms of regulation, which the state set about constructing throughout the late 1970s and into the 1980s (Kelsey, 1990). It is possible to see that the decline of the Fordist mode provided the conditions for the emergence of the Tribunal in 1975. The Fordist state could not fully contain Māori concerns for Treaty rights through the formal legal or parliamentary systems as it had done up to this point. As Wilkes (1993. p.205) argues '[d]emands for the revitalisation of the culture and language, and the return of wrongly appropriated tribal land, now sought a real answer which the old settlements could not produce'.

Kelsey (1993) contends that in the 1980s the state could respond to Māori Treaty activism in two ways. It could use coercion, as had previous governments, with the potential for increasing Māori sense of grievance and, therefore, conflict with the state. Or it could choose the path of *passive revolution*, a term derived from Antonio Gramsci that denotes the 'inclusion of new social groups under the hegemony of the political order without the expansion of real political control by the mass of population over politics' (ibid: 234). The State chose the latter, inducing and encouraging aggrieved Māori to seek the Tribunal as neutral arbiter between the conflicted parties. Through the Tribunal the State temporarily brought the counter-hegemonic activities of Māori within its ambit until the challenge was defused, through both real (in terms of limited fiscal settlements), and rhetorical concessions (e.g., formal apologies) , and the promise of meaningful 'change' in State-Māori relationships. By drawing Māori protests off the street and national television and into the Waitangi Tribunal (see Gagne, 2009, p. 42), the State was largely able to regulate actions that could have presented a barrier to the developing Post-Fordist regime of accumulation.

We are not suggesting that the Tribunal was intentionally created as a regulatory body from its inception. Earlier we argued that the Tribunal was created as a forum to hear grievances, a necessary response by the state to the developing radicalisation of Māori activism. Jessop (1991) contends that

the emergence and subsequent dynamic of structures of regulation might be endowed with a greater intentionality than is justified. In the case of the Tribunal it would be an exaggeration to *reduce* its origin merely to the formation of a mode of regulation in response to accumulation or ideological crises. However, it *is* possible to view the emergence of the Tribunal as a Post-Fordist mode of regulation as a non-intentional, but nonetheless focussed strategy, aimed at ensuring state-controlled direction of an already emergent structure. Regulation should be viewed as a complex and provisional process mediated through institutions and conducted by social forces. Given these points, the Waitangi Tribunal should be viewed as a state-formed regulatory body that assisted the state to *institutionalise Māori dissent and political activism* as part of the Post-Fordist regulatory regime that began to emerge and then expand in New Zealand throughout the 1980s.

For the Tribunal to institutionalise Māori protest and dissent, it had to be able to attract Māori claimants to its processes. The Tribunal developed in ways that enabled it to attract claimants by appearing to be more responsive to Māori grievances than the formal court system. The ability of the Tribunal to attract claims enhanced as it proactively moved from replicating the process of the formal justice system to the 'informal' formalism of marae protocol. The changes can be shown by contrasting the reaction to the first hearing by the Tribunal and then subsequent hearings that were altered to attract Māori claimants.

The first hearing of the Tribunal was in Auckland on the 30 May 1977. The claim was made by a Mr Hawke relating to fishing rights of the Ngāti Whātua (Waitangi Tribunal, 1978). Williams (1989) writes that the Tribunal attempted to establish the atmosphere of formal court proceedings, and also tried to narrow the claim to one of legal niceties. Williams (1989) and Sharp (1997) also note the choice of location for the hearing, the Ballroom of the Hotel Intercontinental, and the processes employed, were highly inappropriate for the hearing. No attempt was made to use Māori customs and the chairperson referred to it as a Magistrates Court (Catalinac, 2004). From this it is possible to see that the Tribunal in the beginning had the formality and processes of the formal justice system. However, as Sharp (1997, p. 77) writes 'the Māori people for whose benefit it was primarily designed did not like its manner of proceeding according to formal, legal, Pākehā practice'.

The response by claimants to the formality of Tribunal hearings and its restricted jurisdiction was clearly shown by the small number of claims to go before the Tribunal during the initial years of its operation. Just fourteen claims were lodged in the first nine years of its existence to 1984. However, this changed as the processes and operations of the Tribunal were altered, as shown in the Motonui claim. Lodged in 1982, the Te Atiawa tribe argued that the Motonui Synthetic Fuel project would pollute their traditional fishing grounds (Waitangi Tribunal, 1989). Notably, the hearing was held on a marae, without formal legal procedures, instead using marae protocol. Temm (1990) notes that Pākehā legal formality did not seem appropriate on a marae, so it was decided that marae kawa (protocols) would be adopted for each hearing. It was also decided that legal formalities such as paper work would be kept to a minimum in order to ensure the Tribunal worked in an orderly and efficient manner, but also, because it was important that 'the Waitangi Tribunal be in every sense a people's court' (Temm, 1990: 9). After this claim, hearings were held on home marae, replacing the appearance of legal formalism.

In 1985, the amendment to the Treaty of Waitangi Act allowed retrospective claims back to 1840, and increased the membership of the Tribunal to a Chairperson plus six others, four of whom were to be Māori. By using Māori custom, more fully incorporating Māori in its processes, and eventually being able to examine historical grievances, the Tribunal was able to present itself as a body able to address and resolve Māori claims in an 'appropriate manner'. By the beginning of 1994, claims lodged with the Tribunal had increased to 400 (Kneebone, 1994). Thus, in the period covering the late 1970s to the late 1980s, the Tribunal arguably transformed itself from a formal body of justice, to that of an informal justice forum that engaged with Māori on their terms; at least as far as protocol was concerned. The Tribunal was able to gain acceptance from Māori by making decisions that not only recognised past injustices, but also produced tangible, albeit unintended, results.

Abel (1982) writes that because the state presents itself as the only legitimate source of legal authority, other processes, for example communitarian justice, require its support to provide the necessary legitimacy for their survival. This was demonstrated in the New Zealand context by the 1987 *New Zealand Māori Council v Attorney General* case.

The 1987 court decision gave the Tribunals interpretation in favour of Māori claimants the orthodoxy of informed opinion. Renwick (1993) argues that this had three important effects upon Māori and the Tribunal. Firstly, the legitimacy of the Tribunal for Māori was enhanced by the formal recognition of the validity of the forum's interpretations and deliberations. Secondly, it demonstrated that informalist processes could find in favour of Māori interests, and that going to the Tribunal would not be a waste of time or resources. Thirdly, arguably the decision was instrumental in changing the character of Māori activism by moving protests from the street to the Tribunal process, where many Māori began to believe that justice could now be achieved. Renwick (1993, p.11) underlines the counter-hegemonic potentialities of the Tribunal when he contends that during this period in Tribunal history, 'Māori advocacy… moved beyond protest marches to hearings of the Waitangi Tribunal, the courts, the committee rooms of parliament and the offices of Ministers of the Crown... The process has growing legitimacy in Māori minds'.

This development had a demonstrable effect on Māori protests during the late 1980s and early 1990s. Protests that were previously loud and visible moved from being confrontational to conciliatory (Sharp, 1997; see also Gagne, 2009, p. 42). As a result, grievants (more commonly referred to by media and politicians as 'radicals') who did not use the path offered by the Tribunal had their complaints labelled illegitimate. Arguably then, a key outcome of the Tribunal process was State containment of Māori radicalism and the incorporation of Māori political discourse. Kelsey (1992, p.601) underlines this argument when she wrote that:

> …those who harbour grievances are persuaded to abandon radical measures, such as boycotts or militant action, in favour of orderly and peaceful resolution under the protection of informal state institutions. The conflict is redefined, its manifestation controlled within state-prescribed limits and the demands of the grievants moderated... Continued resort to extra-legal tactics by other grievants can be discredited by reference to those who have accepted the opportunity, which the state has provided, to address their concerns *responsibly* [our emphasis].

In effect, Māori were directed towards a state-sanctioned process which worked as an informal justice body independent of the formal system. However, while the Tribunal may have become the environment where the struggle over Māori claims was contained, ongoing regulation of socio-political discontent was never absolute. As Jessop (1991, p.73) writes 'since there are no institutional guarantees that struggles will always be contained within these forms and/or resolved in ways that reproduce these forms, the stability of an accumulation regime or mode of regulation is always relative, always partial, and always provisional'. So, while Māori gained from the Tribunal process in terms of positive claims decisions and successful court actions to temporarily halt government legislation, these successes were very much *unintended consequences* of the Tribunals regulatory process and, more importantly for our argument, extremely rare.

According to Merry (1992) state controlled informal justice institutions may provide indigenous peoples such as Māori, an opportunity to push the boundaries of the imposed regulatory ordering and mould them to better suit their needs. However, despite the contestability of control over informal processes, in practice the state can employ a number of tactics to maintain or regain control of the regulatory environment, including reconstituted legislation; withdrawal of financial support and/or constructing new processes and strategies that divert focus away from a domain that may threaten state interests begin working in unintended ways. For example, in response to the Tribunal recommending the return of 44 hectares of private land in the Te Roroa claim, the Crown passed legislation in 1992 to prevent any further recommendations on the return of private land, excepting only the *1988 State Enterprises Act* in relation to State Owned Enterprises. One reason for this has been the pressure exerted by the Government upon the Tribunal against employing their powers under this Act (Gibbs, 2006). This was demonstrated in March 1997, when the Tribunal touted the possibility of this section of the Act being used in relation to the Muriwhenua claim. The State's response was to threaten that such a mandatory ruling would result in the limited settlement fund (set under the Fiscal Envelope, see discussion below) for all claims collapsing, thereby leaving a significant number of claims unresolved. The Tribunal quickly backed down, recommending only that the Crown should enter into direct negotiations with the claimants (see, Barlow, 1997 and Hubbard, 1997).

Given this example, it is possible to suggest that the Tribunal formed the initial basis of a Post-Fordist regulation of Māori claims during the late 1970s, throughout most of 1980s. However, the lack of action by both the fourth Labour and the following National Government in acting upon the Tribunal's recommendations throughout this period, resulted in rising dissatisfaction from Māori with the claims processes by the early 1990s (Kneebone, 1994). It is at this point that government policy was reformulated into a claims resolution process based on direct negotiation with iwi. The first major pan-tribal Treaty settlement extinguished Māori fishing rights in exchange for a limited 1989 settlement, and a share in fishing assets in the Sealords company in 1992, known as the Sealords deal.[5] Iwi were then encouraged to compete for a limited land claims settlement fund, labelled the Fiscal Envelope. Those iwi who chose to participate would have their outstanding Treaty claims extinguished in exchange for a limited financial settlement, while iwi that refused the envelope process were unlikely to receive compensation. The regulatory environment that had been initiated through the Tribunal and dominated by it, was overtaken by the Fiscal Envelope process, and thereafter by the Government favouring the strategy of direct negotiation with iwi claimants. This change in the regulatory environment signalled the beginning of the end of the Tribunal as a significant process in the state's regulation of Māori dissent, in particular those associated with Treaty grievances[6].

Conclusion

The emergence of the Waitangi Tribunal can be explained by the development of a Post-Fordist mode of regulation. The historical basis of

[5] Under the terms of this agreement, the government provided Māori with 150 million dollars towards purchasing a half share in the Sealords company, with Brieley Investments as the joint venture partner. By agreeing to this deal, Māori effectively signed away their commercial fishing rights as guaranteed under the various articles of the Treaty of Waitangi (Webb, 1998).

[6] Joseph (2000: 61) posits another possible explanation for the eventually sidelining of the Tribunal, and for Government attempts to nullify its powers: '[t]he Tribunal's work evolved in the midst of a collision between two contradictory forces: on the one hand, a genuine political will to improve the situation for Māori; on the other, a new commitment to neo-liberal economic policies that transformed state structures and undermined the capacity to fulfil the promises generated by that political will'. Arguably, the Tribunal's willingness to even signal the possible use of its powers, thereby effecting Crown control over resource allocation, was a potential stumbling block to the neo-liberal idea (see also Kelsey, 1993).

Māori Treaty grievances emanated largely from the alienation of land that occurred during the colonial context and throughout the 20th century. Legislation supported this acquisition and throughout the pre-Fordist and Fordist eras, the state was able to regulate Māori protests either by ignoring them or channelling them towards formal, legal processes, where grievances were less likely to interrupt the processes of capital accumulation.

The Tribunal emerged during a crumbling Fordist regime of accumulation and the rise of Post-Fordism in the New Zealand context. The establishment of the Tribunal can be understood as a consequence of the transition to the new mode of accumulation and the concomitant need to ensure the continuation of a capital friendly social order. However, the development of the Tribunal should not be viewed as the direct result of planning by certain interest groups to regulate or control Māori claims. The analysis presented here shows the non-intentional development of the Tribunal into a mode of informalist regulation, where strategic conduct by the State may have only been used to impose coherence and direction on an already emergent structure.

The increased use of informal procedures by the Tribunal throughout the 1980s can also be seen as a change in the mode of regulation from Fordist to Post-Fordist regimes, where dissent is channelled into an institution that defines the limits of the justice that can be dispensed. The less formal procedures developed by the Tribunal attracted Māori claimants, which incorporated their activism within the state-controlled apparatus. Thus, the Tribunal functioned as a Post-Fordist mode of regulation by incorporating Māori grievances in ways that nullified their potential to threaten the hegemonic legitimacy of the New Zealand state.

The final chapter in the role of the Waitangi Tribunal as a key component in the Post-Fordist regulation of Māori socio-political dissent is now playing out. Since the mid 1990s, the position of the Tribunal in the regulatory hierarchy was supplanted by the Fiscal Envelope (Robinson, 2002), with its cap on resourcing of Treaty claims, and more contemporarily by the favour shown by all participants to the strategy of direct negotiation. This is not to say the Tribunal is totally irrelevant, as it remains important to some iwi and other Māori organisations for the role it plays in the preparation of Treaty claims. However, its part in the process of regulation and control of Māori activism has been usurped by the recognition by senior

politicians of the ideological and fiscal benefits to be had from taking direct control of State-iwi engagement.

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